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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.L.P. 614/2015

% *Judgment dated 6th April, 2016*

STATE Petitioner

Through : Ms.Richa Kapoor, Adv.

versus

YASIR ALTAF & ORS Respondents

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

CRL.M.A. 11911/2015.

1. This is an application filed by the petitioner seeking condonation of 46 days' delay in filing the present leave to appeal petition.
2. Having heard counsel for the petitioner and in the interest of justice, present application is allowed. Delay in filing the leave to appeal petition is condoned. Let criminal leave to appeal petition be taken on record.
3. Application stands disposed of.

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4. Present criminal leave to appeal petition has been filed by the petitioner under Section 378(1) of the Code of Criminal Procedure against the judgment dated 25.2.2015, whereby the respondents stands acquitted.
5. As per the prosecution on 25.06.2010, the complainant, Eva Elizabeth De Kan, had given a written complaint to the Commissioner of Police, Head Quarters, Indraprastha Estate, New Delhi, wherein she had stated that the complainant and her friend, Libby de Haas, who were Dutch nationals, arrived India as a tourist and on 06.01.2010 they went to Connaught place

for looking SIM Card for their mobile phones, where two persons, namely, Yasir Altaf and Omer Baktoo, along with their one friend, Johny, met them. During the conversation they represented themselves as tourist guides working for Government tourist agency also told them that they could help them in getting the SIM Card. They also told the complainant and her friend that they should see Kashmir which is a very beautiful place in India and tried to convince the complainant and her friend by showing pictures of Gulmarg, Srinagar, Pahalgam. etc. It has also been alleged by the complainant that both the accused persons represented that they had lots of connections, contacts, influence and power. It has further been alleged that the said persons lured and convinced the complainant and her friend to stay in Kashmir. On the assurance given by the accused persons, complainant and her friend agreed to visit Kashmir. Accused, Yasir Altaf and Omer Baktoo, took the complainant and her friend to a travel agent close to Connaught place and introduced them to one, Mr.Ali, as the Owner/Manager of that agency. It has also been alleged that on representation of Mr.Ali, the complainant paid 1700 Euro (20,000/- by Indian rupees as cash and balance by credit card) and similarly, her friend Libbi paid Rs.20,000/- by Indian rupees as cash and balance by debit card. On 08.01.2010, complainant and her friend went to Srinagar along with accused, Yasir Altaf and Omer Baktoo, where the accused persons took the complainant and her friend to a house boat named, Omer Khyam, in Dal lake Srinagar, which later on they learnt belongs to accused, Omer Baktoo. It is also alleged in the complaint that when the complainant checked-in the houseboat, the accused, Omer Baktoo and Yasir Altaf, asked them to deposit their passports as it was not safe to keep in the houseboat, upon which the complainant and her friend handed over their passport to the accused persons. It has next been alleged that on

10.01.2010 when complainant and her friend went to Gulmarg and stayed there for two nights, they realized that they had been cheated as they had given lot of money for the tour to Ali whereas the hotel charges were very reasonable. When they told this fact to the accused, Yasir Altaf and Omer Baktoo, both the accused persons threatened the complainant and her friend with dire consequences. They also refused to return their passports and money and they complainant and her friend were forced to stay in the houseboat. It has also been alleged in the complainant that thereafter the accused persons pressurized and forced the complainant and her friend to have sexual intercourse with them in the houseboat. The accused also threatened the complainant and her friend that if they refuse to give them sexual favour and leave the houseboat, they would be in a big trouble because outside the people are being killed by the militants. It is also alleged that the complainant and her friend had no other alternative except to succumb the threats and pressure of the accused persons, due to which the accused persons took advantage of their helplessness and forcibly raped the complainant and her friend for 3-4 days in the houseboat.

6. It has further been alleged in the complaint that on 25.01.2010, complainant/ prosecutrix returned to Delhi along with Yasir Altaf and after two days her friend Libby returned to Delhi along with Omer Baktoo and they all stayed in Hotel Ivory Palace, Karol Bagh, New Delhi. The prosecutrix has further alleged that during their stay at Hotel Ivory Palace, the complainant and her friend were again forced to have sex with Yasir Altaf and Omer Baktoo for about six days.

7. The complainant had also alleged that since she and her friend were to go to Jaipur in their next leg of tour, Yasir Altaf forced them to pay Rs.60,000/- to him stating that they should not go alone to Jaipur as it would not be safe for them. Accused needed the money for travelling and stay and since he promised that he would return the same, the complainant gave Rs.60,000/- to Yasir Altaf. The complainant has alleged that on 01.02.2010, she alongwith her friend, Libby, and Yasir Altaf went to Jaipur, from there they went to Pushkar and Ranthambore and thereafter returned to Delhi on 04.02.2010. During this period also, the accused Altaf threatened her. The complainant has also alleged that when they returned to Delhi on 04.02.2010, they checked-in Hotel Ivory Palace and stayed there till 06.02.2010 and during their stay in the said hotel she found that her four hundred dollars (One Thousand Two Hundred Euros i.e. Rs.25,000/-) were missing from her bag. She suspected that accused Yasir Altaf and Omer Baktoo had stolen the said money, but they could not lodge any report as the passports of the Complainant/prosecutrix and her friend were with accused Yasir Altaf who refused to return the same. In her complaint, complainant has also stated that thereafter while leaving for Agra, accused, Yasir Altaf, returned their passports with the threat that they would not lodge any complaint against Yasir Altaf and his friend Omer Baktoo but did not return the money. From there they went to Ocha on 07.02.2010 and on 08.02.2010 they checked-in Hotel Harmony in Khajurao as this hotel was suggested by Yasir Altaf saying that it belongs to his father. When complainant and her friend reached Khajurao, they found Yasir Altaf in the Hotel. There they stayed in the Hotel for two days. Thereafter, on 13.02.2010 the complainant and her friend left Varanasi for Calcutta by a train in the night and from there they went to Bangladesh. It is alleged in the complaint that the complainant and her

friend were greatly disappointed and it was a nightmare for them to visit India as a tourist as they had been subjected to physical and sexual abuse, cheating, extortion, wrongful confinement by the accused persons.

8. On the complaint made by the complainant, FIR No.114/10 u/s 376/419/420/384/120-B IPC was registered at Police Station Connaught Place. During the course of investigation, the complainant was examined by the police and accused Yasir Altaf was arrested. The complainant was taken to RML Hospital for her medical examination in the W/ASI Sukhda. The complainant was medically examined by the gynecologist vide MLC No.E89657/10. Accused Yasir Altaf was also medically examined vide MLC No. E89831/10. The statement of the prosecutrix u/s 164 Cr.P.C was also recorded. During the course of investigation, efforts were made to trace the accused, Omer Baktoo, but he could not be arrested. Later on, accused Umar Bhaktoo also joined the investigation. The police had also made efforts to examine Miss Libby de Haas, friend of the complainant but could not succeed. E-mails were also sent to her but she did not respond to the same. Charge sheet against accused, Yasir Altaf, was filed in the court. Supplementary charge sheet u/s 376/384/ 419/ 420/ 120B IPC was also filed against accused Omer Baktoo in the Court.
9. The case was committed to the sessions court on 23.04.2014 and accordingly charge for the offence offences u/s 120B/ 420/ 384/ 506 IPC was framed against both the accused persons. A separate charge for the offence u/s 376 IPC was framed against accused, Yasif Altaf Ahmad. Accused persons did not plead guilty and claimed trial.”
10. The prosecution has examined 15 witnesses in support of its case. Statement of accused persons were recorded under Section 313 Cr.P.C. wherein they denied all the allegations and also did not lead any defence

evidence.

11. It may be noticed that before the learned trial court PW-15, Inspr.B.M. Bahuguna has testified that summons to Ms.Eva Elizabeth and Ms.Libby De Hass were ordered to be executed through him. He had taken up the matter with the Ministry of Home Affairs/External Affairs, and the summons and documents were sent through Ministry of External Affairs to the local address of Ms.Elizabeth and Ms.Libby at Netherlands. It was reported that Ms.Elizabeth was not willing to cooperate in this case and come to India. It was also reported by the local Police at Netherlands that Ms.Libby was not a witness to the rape case and they were not willing to cooperate and in fact in fact interested in closure of the case. The report and the documents forwarded by PW-15 were marked as Ex.PW15/E.
12. Since the victims did not depose before the Court the trial court held that the victims are Dutch Nationals and both the victims have not been examined in this case as a result of which, it impacts the statement recorded under Section 164 Cr.P.C. Since, victims have not come before the Court to depose against the accused persons despite making best efforts, the offence under Section 376 is not proved beyond reasonable doubt.
13. It may further be noticed that on 15.10.2015, when the matter was listed before this Court, learned counsel for the petitioner had submitted that the prosecutrix had expressed her inability to come to India and depose, however, a suggestion was made that the deposition of the prosecutrix could be recorded through video conferencing, for which the counsel had sought time. On 28.1.2016 counsel for the petitioner had informed to the court that she had sent an email to the prosecutrix in the month of December, 2015, but no response to the same had been received. Further the communication addressed to the prosecutrix through Ministry of

External Affairs has still not been replied to.

14. Having regard to the fact that despite an option having been given to the petitioner to approach the prosecutrix to record her statement through video conferencing, the petitioner has not been able to locate the whereabouts of the prosecutrix, we find no grounds to interfere with the decision of the trial court. The petition is accordingly dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

APRIL 06, 2016

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